

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4  
5 UNITED STATES OF AMERICA

6  
7 vs.

8  
9 RYAN HARRIS

10  
11 \*\*\*\*\*

12  
13 For Hearing Before:  
14 Chief Judge Mark L. Wolf

15 Motion to Dismiss

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Tuesday, December 13, 2011

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5200, Boston, MA 02210  
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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (Begins, 1:15 p.m.)

3 THE CLERK: Criminal Matter 09-10243, the  
4 United States of America versus Ryan Harris. The Court  
5 is in session. You may be seated.

6 THE COURT: All right. Would those present in  
7 the courtroom please identify themselves for the record.

8 MR. BOOKBINDER: Good afternoon, your Honor,  
9 Adam Bookbinder. And with me is Mona Sedky,  
10 representing the United States.

11 MR. MCGINTY: For Ryan Harris, Charles McGinty  
12 from the Federal Defender's Office. With me is  
13 Christine DeMasso, with your Honor's permission. Thank  
14 you.

15 THE COURT: And Mr. Harris, I understand, is  
16 on the phone, correct?

17 THE DEFENDANT: (By phone.) Yes.

18 THE COURT: All right. The rules don't  
19 require that the defendant be present for proceedings at  
20 which evidence is not being taken. However, I do want  
21 you to understand this, Mr. Harris, to the maximum  
22 extent, so I'm glad we can do it this way.

23 Let's see. Since I saw you on October 20th, the  
24 government has filed a dismissal of all counts as to the  
25 corporate -- the defunct corporate defendant,

1 TCNISO, Inc., that's in order, so it is hereby allowed.  
2 Mr. Harris is the only remaining defendant.

3 Although we'll discuss it later, as I had  
4 Mr. Hohler tell you, as a result of the evolution of my  
5 schedule the trial date will have to be rescheduled and  
6 it is my intention to start the trial on February 21st.  
7 So I'll listen to you, of course, but I think you're  
8 probably going to have to adjust for that.

9 When we left last time, Mr. Bookbinder, you told  
10 me you'd look into what you think the guideline range is  
11 so I could have a sense of what's at stake in this  
12 intriguing -- legally-intriguing case.

13 MR. BOOKBINDER: Your Honor, I did do that  
14 and, I apologize, I actually forgot to bring it, but we  
15 both believe that the guideline range is, I believe,  
16 it's 57 to 71 months, um, is where we believe that it  
17 cannot -- as I said, I printed it out and I think I left  
18 it on my desk.

19 THE COURT: That's based on a certain amount  
20 of loss, I assume?

21 MR. BOOKBINDER: Your Honor, yes, we're using  
22 -- right. The base offense level is 7 because of wire  
23 fraud charges, um, then there is a loss, um, that for  
24 purposes of this calculation anyway we're assuming it's  
25 between \$400,000 -- or actually we're using gain instead

1 of loss because we concluded that loss -- while there is  
2 a loss, that it's impossible to accurately calculate.  
3 So the gain would be between \$400,000 and a million  
4 dollars.

5 THE COURT: This is the gain to?

6 MR. BOOKBINDER: The gain to the defendant.

7 THE COURT: From his alleged conspiracy with  
8 the fellows of Massachusetts?

9 MR. BOOKBINDER: No, the -- well, the  
10 conspiracy with all the users in the fraud scheme in  
11 general. So it's the charge and relevant conduct, your  
12 Honor.

13 THE COURT: All right. And this is premature,  
14 although I expect it will come up later, um, I asked  
15 Mr. Hohler to ask you to read my Rule 29 **Pappathanase**  
16 decision which builds on the **Goldberg** case that I  
17 mentioned on October 20th, that goes to the sufficiency  
18 of the evidence. But, you know, we'll do this in a  
19 logical order. I want to hear you and decide the motion  
20 to dismiss for a lack of venue or a request for a  
21 transfer of venue or to dismiss because the mail fraud  
22 statute's allegedly void for vagueness. Um, my present  
23 tentative view is that I'll deny that motion. But I'm  
24 getting educated about this case and, as you can see  
25 from my reference to **Pappathanase**, which is possible

1     that Mr. McGinty referenced -- he referenced the concept  
2     back in October about the idea of a hub and spoke  
3     without a rim-type conspiracy.

4             MR. MCGINTY: I apologize. I remembered the  
5     case, but I simply didn't cite it. You know, it was in  
6     the **Goldberg** line of cases and, frankly, I did not cite  
7     it and I apologize.

8             THE COURT: Well, no, that's okay. But if  
9     that's a -- here, I'm interested in hearing your  
10    argument, but I'm also interested, as usual, in being as  
11    transparent as possible. With regard to the motion to  
12    dismiss for lack of venue, it appears to me that it's  
13    not meritorious. I think you recognize that it needs to  
14    be decided on the face of the indictment. Okay? The  
15    face of the indictment alleges a conspiracy between  
16    Mr. Harris and, among others, four people in  
17    Massachusetts who allegedly committed overt acts in  
18    furtherance of that conspiracy in Massachusetts. Venue  
19    at trial has to be proven by a preponderance of the  
20    evidence, but my understanding is that if a conspiracy  
21    is proven and it's proven that there was an overt act in  
22    furtherance of it in Massachusetts, venue would exist  
23    here.

24            With regard to the mail fraud counts, I have to --  
25    and it's not perfectly -- and the government may be

1 proceeding on both, but it's not perfectly clear to me  
2 what the government's theory is, that is, whether the  
3 individuals of Massachusetts who made the wire  
4 transmissions were engaged in a scheme that was aided  
5 and abetted by Mr. Harris. You also might have a -- and  
6 you allege that he caused as part of his own scheme, um,  
7 transmissions to be, um, made that arguably could have  
8 caused the people of Massachusetts to make the  
9 transmissions. But, um, you know, if essential offense  
10 conduct occurred in Massachusetts, then it's my  
11 understanding that he could be held liable based on  
12 aiding and abetting even if he didn't act himself in  
13 Massachusetts. I have in mind, **Griffin**, 814 F.2d 806  
14 at 810.

15 So, you know, my present sense is, you know, doing  
16 this on the face of the indictment, the charges survive  
17 a motion to dismiss for lack of venue. My present sense  
18 also is that while it's helpful for me to be educated on  
19 **Falcone** and **Direct Sales**, um, **Direct Sales** made clear  
20 that **Falcone** didn't stand for the proposition that, you  
21 know, a seller could never be held criminally liable for  
22 an alleged conspiracy with a buyer, it's just that the  
23 mere fact of selling and buying is not enough. And it  
24 seems to teach me again that it's a very fact-specific  
25 inquiry that I would have to instruct the jury on if the

1 case gets to a jury.

2 MR. MCGINTY: Can I --

3 THE COURT: But anyway, that's my present  
4 thinking. You should start where you want to start and  
5 argue what you want to argue. It's an interesting  
6 matter and **Pappathanase** is the only case in my almost 27  
7 years as a judge that I've ever granted a Rule 29 motion  
8 on with regard to all counts and it all started with a  
9 motion to dismiss, where the government originally  
10 charged the rebates -- it was known that the rebates  
11 could facilitate tax evasion and **Goldberg** taught that  
12 the defendants had to know they would be used to evade  
13 taxes. The government superseded the indictment, made  
14 the required edit, but the proof didn't rise to that  
15 level.

16 MR. MCGINTY: The Court made a point that a --  
17 that an act in furtherance of the conduct of the  
18 purchasers of the item could cause venue to lie here  
19 against Mr. Harris. What I would like to do is just to  
20 go to the indictment and just to walk through the  
21 indictment and see exactly what it is that's charged  
22 here. If the issue is going to be whether there is  
23 sufficiently charged the wire fraud crime, that's seems  
24 to be an appropriate place to start.

25 Now, what the government alleges is that



1 Mr. Harris had sold firmware, um, the firmware was both,  
2 as I understood it, the software --

3 THE COURT: And sold --

4 MR. MCGINTY: Firmware, which is, as I  
5 understand it, both software and hardware, the hardware  
6 being in the form of a cable modem, the software being  
7 software that could be used, um, either in connection  
8 with the modem or separate from the modem for the  
9 purpose of achieving certain things.

10 Now, let me just back up just for a moment and say  
11 that, um, what Mr. Harris was doing was in the nature of  
12 what's called, in the computer jargon, "reverse  
13 engineering," and another word for it is "jail  
14 breaking." And what that is is identifying the piece of  
15 technology, what the underlying code is, what the  
16 underlying technology is that gives birth to this  
17 device. A recent example of that is the iPhone.

18 A young man of maybe 17 years of age was charged  
19 with having jail-broken or reverse engineered the iPhone  
20 and what Apple tried to do is to make sure that the  
21 iPhone would only use applications created by Apple and  
22 persons who purchased that product say, "Well, we'd like  
23 to have applications in addition to what it is that  
24 Apple provides because there are better applications  
25 out." But Apple could prevent him from doing it by

1     having technological barriers that prevent the accessing  
2     of the internal code to permit those applications to be  
3     used. And what this young man did -- apparently a  
4     brilliant young man, was that he was able to identify  
5     the code that supported the applications that were used  
6     in the iPhone. Having done that, he found himself in a  
7     world of trouble with Apple, which sought to do  
8     something about this because they said that reverse  
9     engineering is fundamentally illegal and they sued him  
10    civilly.

11           The reverse engineering instinct among people who  
12    are on the Internet is to identify -- for each piece of  
13    technological capability, is to identify what that is,  
14    what the underpinnings are, open it out and see what the  
15    applications would be, identify what the platform can  
16    do, and from that open up a potential of things that can  
17    be done.

18           Now, here Mr. Harris wrote a book that was engaged  
19    in the reverse engineering of a cable modem, a device  
20    that connects to the ISP that permits internet access  
21    via a cable. In doing this reverse engineering, he both  
22    opened it up in terms of a book which described what he  
23    did, but he also provided some software and hardware  
24    which permitted the application, by persons who intend  
25    to do things with that, open up the potential of a

1 number of different applications. So this is in the  
2 genre, um, which is now net-wide, of persons who engage  
3 in reverse engineering for purposes of finding out  
4 capability. That's not the same as doing the thing with  
5 the capability.

6 Now, if we go back to the indictment. In the  
7 indictment the government alleges a number of things  
8 that the software can do. Um, one of them is that it  
9 would permit, quote, "Users could obtain internet  
10 service from ISPs without paying for the service." This  
11 is in Paragraph 1 of the indictment. So one of the  
12 things it would permit being done is to get free  
13 service. That's Paragraph 1 of the indictment.

14 The second thing it would permit being done is to  
15 get faster service. Referring now to Paragraph 12.  
16 Quote: "Harris's products and services also enabled  
17 users to obtain faster, upgraded or uncapped internet  
18 service without paying the premiums." Now, what this  
19 does is it suggests that what Harris is doing is  
20 permitting a person to exceed a limitation that's  
21 created by the cable company, by the ISP. In fact,  
22 there is a world of information to the effect that the  
23 uncapped, the effort to obtain greater speed on the  
24 Internet can be consistent with the, um, with the  
25 service that a person is paying for for the ISP.

1           There are articles that appear in, among other  
2 places, PC Magazine and so forth, which talk about the  
3 --

4           THE COURT: Yeah, but this is --

5           MR. MCGINTY: If I could just sort of -- if I  
6 could just put this into context.

7           THE COURT: All right. Go ahead. Go ahead.

8           MR. MCGINTY: Part of this is implied in the  
9 indictment, some of it is expressly stated in the  
10 indictment. It's important to, I think, root this out.

11          THE COURT: Well, I mean, it may be at trial.  
12 But let me ask you the following. I understood from  
13 your supplemental memo that you accept that, in the  
14 context of this case, the motion to dismiss should be  
15 decided based on the face of the indictment, not --  
16 because I basically have to try the whole case, um, to  
17 determine the venue issue.

18          MR. MCGINTY: Well, the -- ordinarily the  
19 answer to that is "Yes." Um, there are some things that  
20 are not on the face of the indictment. For example, the  
21 government is contemplating charging Mr. Harris in the  
22 Northern District of California on tax charges. I think  
23 that's a fact that --

24          THE COURT: I think in the Central District,  
25 they said.

1 MR. MCGINTY: Um, either Central or Northern.

2 MR. BOOKBINDER: Actually it's neither, it's  
3 Eastern.

4 MR. MCGINTY: Eastern? I think of California  
5 in terms of going south, not east or west. Um, but  
6 that's a fact, it's a part of what's in the indictment.

7 THE COURT: Okay, that -- that may relate to  
8 the motion to transfer venue if venue's properly here.

9 MR. MCGINTY: But to sort of develop this  
10 point just a tiny bit further --

11 THE COURT: No, you can because, while I doubt  
12 it's really cognizable now, this is, when we get to  
13 trial, can be very important.

14 MR. MCGINTY: So, um, what is -- what ISPs do  
15 is they frequently choke off the cable speed that they  
16 otherwise contract with the customer for so a customer  
17 applying or paying the premium for a certain speed, um,  
18 finds that that speed is not what's provided. Imagine  
19 going into a produce store and finding the scales are  
20 not working or finding that when one pumps gas into  
21 one's car --

22 THE COURT: What chokes it off?

23 MR. MCGINTY: What chokes it off is they have  
24 the capability of narrowing the -- of both narrowing the  
25 broadband that's provided to the customer and narrowing

1       what it is they can do with that broad band.

2               THE COURT:   Who has that capacity, the ISPs?

3               MR. MCGINTY:   The ISPs.   Um, one of them, for  
4       example, Comcast, um, was sued by the FCC because what  
5       Comcast was doing was narrowing and throttling, um,  
6       traffic that involved the person-to-person websites.   So  
7       the FCC, in 2008, um, issued a cease-and-desist order  
8       against the cable company, Comcast, which is one of the  
9       ISPs here, against Comcast, um, for what they were  
10      doing, which was to choke, um, individual customers'  
11      access to the net services that they were getting or  
12      thought they were getting when they contracted for  
13      service fees.

14              THE COURT:   What's the relevance of that to  
15      this case and this motion?

16              MR. MCGINTY:   The point of this is that one of  
17      the things that in the indictment, um, the government  
18      alleges is that this -- this firmware had the capability  
19      of permitting a user to increase the speed of their  
20      access notwithstanding the limits that were put on by  
21      Comcast.   In some circumstances what they would be able  
22      to do is to achieve the speed that they were promised  
23      for the fee that they're paying and --

24              THE COURT:   I think the allegation in the  
25      indictment is that they were able, with these devices,

1 to either get services they didn't pay for or a higher  
2 level of services, more speed than they were paying for,  
3 and therefore it was a scheme to deprive, say, Comcast  
4 of money.

5 MR. MCGINTY: Well, I think one of the points  
6 I think that the Court -- um, one of the lessons that  
7 may be drawn from the Court's **Pappathanase** decision is  
8 four weeks into the case a proposition that might have  
9 been apparent had there been acknowledgements by the  
10 government of the limits of their proof went four weeks  
11 into trial before it was -- before the Court confronted  
12 the issue of whether this was a scheme for purposes of  
13 defeating the collection of taxes. Um, here there's one  
14 more ingredient to this, which is that Mr. Harris is  
15 called into Massachusetts, um, and is asked to stand  
16 trial on a case which, at the end of the day may prove  
17 to be in the same category as **Pappathanase**, with one  
18 additional reading, which is that he will effectively be  
19 denied his right to a constitutionally-suitable venue.

20 So one of the things that's important, I think, to  
21 do here is to take a look at what really is underlying  
22 the charge, what underlies the predicate, but I don't  
23 want to rest entirely on that because, um, the way it's  
24 charged in the indictment, it's as if Comcast provided,  
25 um, the appropriate Internet access speed that it

1     contracted for and, in reality, that's not what happens,  
2     and that's part of what motivates a person to get a  
3     modem because one of the things they can do is the self-  
4     help of responding to the choke or throttling by the  
5     cable company.

6             Now, the third part of this is that, um, according  
7     to the government now, in Paragraph 13, this can be  
8     used, quote, "to mask the user's on-line identity." So  
9     one of the things that can be done here is the person  
10    can use that capability that this modem has to mask who  
11    they are. Now, if one were an Iranian national or  
12    perhaps a Libyan national or perhaps a dissident  
13    communicating with their home country, there are a world  
14    of reasons why a person, in terms of their political  
15    communication on the internet, might not want the origin  
16    of their speech to be made available on the Internet.  
17    And persons who purchase this, among the things -- among  
18    the potentials they get is the possibility of  
19    concealing, um, their identity, and that can be, in many  
20    cases, an entirely laudable objective.

21            THE COURT: Well, I don't think it's the  
22    government's contention that it's intrinsically unlawful  
23    to mask your identity. The way I read this is they were  
24    providing an explanation for why somebody might want to  
25    mask their identity and they might want to mask their



1 identity because they're stealing services they haven't  
2 paid for.

3 MR. MCGINTY: Right, but what the government  
4 is doing here is to say that this is a bad thing, this  
5 firmware is a bad thing, it is in itself a bad thing.  
6 Now, they don't point to a statute that makes this thing  
7 prohibited. And, you know, in the positive law we look  
8 to the thing that makes the thing illegal. When they  
9 say it's a bad thing, um, they talk about getting faster  
10 -- they talk about getting the free service. Where they  
11 don't point to is that among the capabilities that this  
12 thing does, which they acknowledge in their indictment,  
13 is it permits the masking of identity, the hiding of  
14 identity, and a purchaser of a cable modem can be doing  
15 it for the purpose of concealing who they are for  
16 purpose of political speech.

17 Now the final ingredient on this, as I understand  
18 the government's allegation, is that this program can  
19 also permit, um, the obtaining of MAC addresses. Now, a  
20 MAC address, which the government -- you know, we have  
21 many times said to the government, "Why is getting a MAC  
22 address a crime?"

23 THE COURT: It's not charged as a crime. The  
24 crimes charged here, as I understand it, are conspiracy  
25 to commit wire fraud and wire fraud, so. You know, the

1 fact that -- you know, for wire fraud they have to prove  
2 a scheme to get money or property based, you know,  
3 unlawfully and the use of the wires in furtherance of  
4 the scheme. The constituent elements don't have to be  
5 unlawful just as -- you know, we went through this the  
6 last time. An overt act doesn't have to be  
7 intrinsically unlawful, but if it's in furtherance of a  
8 conspiracy, um, it's evidence of a crime and an  
9 essential element of the crime in this case.

10 MR. MCGINTY: I'm getting ahead of myself a  
11 tiny bit to say that the ingredient the government has  
12 now alleged and ultimately would be unable to prove is  
13 that the sale of these items was with the knowledge,  
14 leave out the intent, to assist in a specific crime --  
15 without the knowledge of the application of the device.  
16 So what I'm talking now is about the government's  
17 allegation of not what the capability of the device is,  
18 before getting into the question, um, that's fairly  
19 begged by the government's indictment, which is where's  
20 the allegation, um, in the indictment, um, that he knew  
21 what it was -- that the capabilities of the modem would  
22 be used for purposes of engaging in wire fraud?

23 THE COURT: Well, I think it is alleged in  
24 Paragraph 15 of the conspiracy in the sense that it's  
25 alleged that Mr. Harris, um, knowingly conspired to

1 commit wire fraud. Because, I mean, that's what the  
2 standard instruction is. You know, they're going to  
3 have to prove the agreement charged in Count 1, and not  
4 some other agreement, that is, an agreement that has  
5 essentially or substantially all of those people in  
6 Massachusetts in it and not individual conspiracies with  
7 individuals. But I think that's the import of that.  
8 Because a conspiracy, you know, requires that somebody  
9 knowingly and willfully intend to agree and intend that  
10 the crime be committed.

11 So there the government's going to have to prove  
12 that Mr. Harris and at least some of the people named in  
13 the indictment entered into an agreement, express or by  
14 conduct, and that he intended that wire fraud be  
15 committed.

16 MR. MCGINTY: That is the formal charge,  
17 that's an iteration of what the statutory elements are.  
18 Um, that can be sufficient in a case that did not  
19 implicate a larger constitutional guaranty relating to  
20 the proper venue. But here when we look to what the  
21 overt acts are and we look to what is charged with  
22 respect to the conduct and the knowledge, the nitty-  
23 gritty ingredients of what the government is purporting  
24 to be able to prove, there we come up short.

25 Now, it may be that the Court and the government

1 can say, "Well, that's what a trial is for," but it's a  
2 trial in a place that is a constitutionally-assured  
3 place and here what we have is not only the **Pappathanase**  
4 problem of getting to the end of the road and finding  
5 out we could have addressed this at the start of the  
6 road, but why is Harris answerable for an allegation of  
7 participation in wire fraud in Massachusetts where the  
8 critical ingredients are, with respect to three of the  
9 persons named here, that he -- and let's take -- let's  
10 assume it's the case that they can prove that it was he  
11 that sold the item -- which I think the proof will come  
12 up short of, he did not sell the item, it was sold by  
13 other people who worked for the company. But apart from  
14 that, if he had sold the item without having the benefit  
15 of knowing how that item might be used, then you can say  
16 with respect to the sale of the item, yes, he had a  
17 connection to that delivery in Massachusetts. But if  
18 the crime in Massachusetts isn't the delivery of the  
19 item, it's what did he do with respect to a rip-off of  
20 Comcast? Did he know how it was going to be done? Did  
21 he know if the target was Comcast? Did he know what the  
22 person was going to do? Did he get on the phone with  
23 him and say, "Look, I know you're having some technical  
24 problems here." If you attach this point to this point  
25 to this point, um, Comcast can't defeat that. Did he

1 say anything to indicate that he knew the application  
2 here was going to be theft, not masking identity, not  
3 MAC address, um, grasping, not getting greater service  
4 from the ISP, but was going to be theft of service?

5 Now, with respect to these three persons, the  
6 theft of service that's charged, with respect to these  
7 three substantive accounts, is going to be that for a  
8 period of that calendar year each of these people had  
9 free internet service, which would roughly approximate  
10 the maximum likely cost of this would be 50 bucks a  
11 month times 12, which would be \$600. Not satisfying any  
12 jurisdictional standard here. Um, not certainly  
13 satisfying the --

14 THE COURT: Why doesn't that satisfy a  
15 jurisdictional standard?

16 MR. MCGINTY: Um, because while wire fraud  
17 does not have a money amount, um, to the extent the  
18 government doesn't --

19 THE COURT: He doesn't have to get any money.  
20 If you engage in a scheme to defraud and it doesn't  
21 succeed, um, you're still guilty. When I was reading --  
22 when I was preparing today, I thought of the First  
23 Circuit decision in **Potter**, that I may have mentioned to  
24 you back in October, um, it's an honest services fraud  
25 case, but that that's where there was this scheme to

1 give money to the law firm of a public official with the  
2 expectation that some of that would get to the public  
3 official and he would vote to get the racing dates in  
4 Rhode Island, I think. And the scheme was aborted, you  
5 know, before the public official got any money and, in  
6 fact, it wasn't proven, I think, that the law firm knew  
7 about the scheme. But the people who devised the  
8 scheme, um, were found to have been properly convicted.

9 MR. MCGINTY: There's no jurisdictional amount  
10 that is the -- sort of the condition precedent to a wire  
11 fraud charge. I would suggest that on the substantive  
12 charges here, um, that for the -- for the -- to be a  
13 realized amount of money, not what a person actually  
14 gained, but what the amount of money at issue was, there  
15 has never been a wire fraud case in this district of  
16 \$600. Um, the vindication of the right that's sought  
17 here is the use of the wire fraud statute to reach  
18 conduct that has not been charged in the United States  
19 except for one court where the prosecution was  
20 abandoned. In two other courts, computer fraud charges  
21 were brought and then reduced to a misdemeanor in order  
22 to elicit a plea. But nowhere has wire fraud been  
23 brought, as I understand it, involving conduct of the  
24 sort, for the amount of money at issue here or where a  
25 person has created a -- sold an item which has

1 capability of doing things -- among the capabilities it  
2 has is the capability to be misused, where that becomes  
3 the predicate for the person being charged for  
4 participation with a user in what the user was doing,  
5 um, quite apart from the fact that here, in the  
6 indictment -- and I look through -- if you look through  
7 the paragraphs that relate to the specific individuals,  
8 without any allegation that there was shared  
9 communication between Harris and them with respect to  
10 what they were going to do.

11 So the issue here is, Harris makes a capability.  
12 The capability charged in the indictment is the  
13 capability of free service, enhanced service, MAC  
14 addresses, and masking one's identity. Masking one's  
15 identity is not fraud.

16 THE COURT: It could be part of a scheme to  
17 defraud.

18 MR. MCGINTY: But leaving a scheme to defraud  
19 out, because if you don't have the knowledge, you don't  
20 have participation in the scheme.

21 THE COURT: I know, but --

22 MR. MCGINTY: So hypothetically speaking  
23 you're correct in this case, but there's no allegation  
24 to that effect.

25 So with respect to the MAC addresses, making the

1 capability that permits you to have -- to retrieve MAC  
2 addresses implicates the conduct of Google every day in  
3 its operation. Um, a MAC address is no different from a  
4 VIN number on a car. It's out there. It's not  
5 confidential. Um, Comcast can't claim that this is  
6 something assigned to a person that in some way, um,  
7 deprives them of their property interest in that.

8 So the capability to do these things, um --  
9 there's multifaceted capabilities here. The government  
10 in its indictment, quite apart from the reality, which  
11 is that the capability is broader than the government  
12 acknowledges -- among other things is simply the  
13 capability of making a connection to an ISP, there's the  
14 self-diagnostic capability, there are other capabilities  
15 not acknowledged in the indictment. But taking what's  
16 charged in the indictment, which of those four, three of  
17 which under most circumstances are illegal in terms of  
18 making that capability and the fourth one only if you  
19 allege knowing participation, benefitting participation  
20 in the conduct of a third party with what the third  
21 party is doing.

22 THE COURT: Well, you actually just used a  
23 word that I was going to direct you all to brief, which  
24 is "benefit." In other words, it's -- here's an alleged  
25 mail fraud. Um, I mean, mail fraud's alleged here. And



1 I did want to try to get some clarification today on  
2 what the government's theory is and their theory may be  
3 that Mr. Harris aided and abetted -- I'm sorry, wire  
4 fraud by the individuals who made the transmissions.

5 One of the questions that I expect will rise, and  
6 you just alluded to it, is whether the government is  
7 required to prove that the scheme was intended to  
8 benefit Mr. Harris in some way? In **DiMasi**, I instructed  
9 the jury that it had to find that payments made to third  
10 parties were for his benefit, but that was because that  
11 was alleged in the indictment and I noted that I might  
12 be requiring -- and the government undertook that burden  
13 until just before the case went to the jury. And I  
14 noted that I might be instructing that the jury had to  
15 find more than the law required for the purposes of a  
16 Hobbs Act extortion under 951, um, there's Supreme Court  
17 cases that say, you know, if a public official extorts  
18 money, the money -- you know, causes money to be paid  
19 under color of official right, that it doesn't have to  
20 come to him or be for his benefit, it could be for a  
21 third party. So, I mean, this is something we're going  
22 to have to zero in on if the case goes on beyond today.

23 MR. MCGINTY: But in this case, um, taking  
24 what the critical ingredient is, um, whether Harris had  
25 the knowledge of the unlawful application, um, that

1 seems to be a conspicuous, um, omission here, and let's  
2 add one more ingredient to that. With respect to, um,  
3 the first of the named persons, um, the government  
4 there, um, alleges with respect to him not that he had  
5 purchased from Harris, but on two occasions had  
6 downloaded, and under the circumstances then it's fairly  
7 obvious that what the government is not going to be  
8 trying to prove is that the items that were obtained in  
9 those instances even came from Harris.

10 To the extent they were downloaded, what we know  
11 in looking at the discovery is that one of the downloads  
12 was from the -- um, the software having been made  
13 available on the internet without cost. The second was  
14 that it was made available by a different person, um,  
15 another employee of the company, um, under circumstances  
16 that were known only to her, um, if she made available  
17 that. So with respect to the first of the individuals,  
18 there's not even any, um, sale by Harris, so there's no  
19 money, presumably there's no financial benefit there.  
20 So what you have with respect to these four persons, or  
21 for three of them, you don't have any knowledge, and for  
22 the fourth, you don't even have a transaction.

23 Now, again, you know, to harp on the venue issue,  
24 because it's so important, um, is that the government  
25 didn't elect to bring this in California, they didn't

1 elect to bring this where the scope of the conduct by  
2 Harris, um, would be addressed, there'd be no venue  
3 issue there, but it's brought here, um, it's brought  
4 here because presumably the government's view is that by  
5 alleging secondary conduct --

6 THE COURT: Actually there's at least one  
7 Ninth Circuit case, which struck me as not quite right,  
8 um, that holds that the proper place for venue in wire  
9 fraud is where the transmissions were made. I wouldn't  
10 think, and I believe the First Circuit's statement of  
11 what's required for venue would be, you know, where some  
12 essential offense conduct occurred and it could be where  
13 the scheme was devised. But I do -- but to me, if the  
14 case were brought in California, you'd probably still  
15 have a venue claim based on their theory of the case.

16 MR. MCGINTY: Um, you know, it's interesting  
17 that the Court had raised the issue of were this a civil  
18 case, what about the jurisdictional aspect of this? Um,  
19 I would note that in the last year the Supreme Court in  
20 two different cases has really tightened up the  
21 opportunity to sue under a long-arm statute where you'd  
22 pull someone in by virtue of conduct occurring, um, in a  
23 distant locale both in, um, **Goodyear Dunlop** and also in  
24 **McIntyre Machinery**.

25 What's interesting in **McIntyre Machinery** is it

1 involved a -- um, some metal shearing from a machine  
2 that was made in London, four of those machines had  
3 ended up in New Jersey, the accident occurs in New  
4 Jersey, and under the stream of commerce, um,  
5 jurisprudence, as I understood it -- and maybe I didn't  
6 understand it too well, but it was **Gray vs. Standard**  
7 **Radio** back in law school and the issue of if you have a  
8 radiator which ends up in Illinois and then the pressure  
9 valve on it fails and the thing explodes and hot water  
10 goes all over and the person's very badly harmed, the  
11 stream of commerce permitted you, in **Gray**, to say "When  
12 it blew up in my house, I can go down to the court and  
13 file suit," and, you know, **Gray** became one of the  
14 principal cases that sort of dictated the course of  
15 jurisdiction.

16 If I understand what the Supreme Court's doing, in  
17 a pretty badly-splintered decision, but in **McIntyre**  
18 **Machinery**, um, they seem to be chucking the stream of  
19 commerce argument that if you set something out, where  
20 it ends up, there can be jurisdiction if a harm flows  
21 from that. Um, there -- here, um, if Harris sold  
22 something and if the harm is independent of the sale of  
23 the item because there's a plus factor -- in other  
24 words, there's nothing wrong with ordering a modem,  
25 there's nothing wrong with ordering software, it's

1 entirely lawful for Harris to sell it, it's entirely  
2 lawful for someone to purchase it, the only thing that  
3 makes this illegal is the application, provided Harris  
4 knew about it.

5 So in order for this to be civilly sued here for  
6 something that originated in California, the agents sort  
7 of cooking up a couple of, you know, sales here wouldn't  
8 -- certainly wouldn't cut it, because that would be  
9 viewed as manipulating it, um, the fact that it ended up  
10 here doesn't answer the question in **McIntyre** and the  
11 question is whether in **McIntyre** there were four of these  
12 items that ended up in New Jersey. The Court just  
13 pushed that aside and said that the issue is whether or  
14 not, um, the person, quote, "intended to submit to the  
15 power of that sovereign," um, and it said, um, "and  
16 whether the person can be said to have targeted the  
17 forum."

18 Let's go back to the first individual charged here  
19 who downloaded -- who went to the site for the company,  
20 who downloaded from the site a free application. So the  
21 site presumably -- and, you know, computer -- you know,  
22 net locations are, um, almost a theory. But if you go  
23 to a site which is generated by a business in California  
24 and you go in to get from them something and you then  
25 apply it in Massachusetts, um, on any civil application

1 of whether civil jurisdiction would lie with respect to  
2 that first individual the answer would be resoundingly  
3 "no." And second would be, with respect to the other  
4 three, what is the conduct that he's answering for  
5 here? The conduct that he's answering for would be that  
6 he was complicit in what they did with the item, not in  
7 sending it, but what he was complicit with --

8 THE COURT: I think that's right. The  
9 jurisprudence basically says that -- I mean, if there's  
10 a conspiracy and it occurs in, you know, some acts or --  
11 um, that acts are committed as part of the conspiracy  
12 and in furtherance of the conspiracy in different  
13 jurisdictions, um, the case -- there's venue in any  
14 jurisdiction in which an overt act was committed. And  
15 they allege that there are overt acts committed here.

16 MR. MCGINTY: But the overt acts they're  
17 alleging, um, do not include the ingredient that makes  
18 it a crime for Harris. So if the overt acts --

19 THE COURT: But we went through this last time  
20 with the hammer, an overt act doesn't have to be  
21 intrinsically unlawful if it's --

22 MR. MCGINTY: No, it doesn't have to be, but  
23 it has to be the thing that's the overt act in  
24 connection with the crime. Now, if Harris provides  
25 something which someone else uses in a fashion that is a

1 crime -- now, the Court can say, "Well, we're not going  
2 to" -- "that's what trial is for," I mean, if this were  
3 a civil case we would have supplemental filings to  
4 address that. But here, um, if you look at the  
5 indictment and say, "How are they charged?" Given the  
6 fact that there's a constitutional guaranty of a venue,  
7 um, not once but twice in the Constitution, to assure a  
8 person would only be charged in a place, um, that is --  
9 where the venue is appropriate, honoring that in a  
10 situation where you're looking at the indictment and you  
11 say, "Where do you allege with respect to Person Number  
12 1, (A) that he knew what the application was going to  
13 be, and (B) that he sold anything, as opposed to it  
14 being downloaded from a site?" And with respect to the  
15 other three, "Where's the thing that says that he  
16 knew" --

17 (Interruption dial tone.)

18 THE COURT: We'll try to get Mr. Harris back.

19 (Clerk redials.)

20 THE COURT: And I think you've made these  
21 points. Just to move ahead a little, and you can  
22 address them now or we can do --

23 THE DEFENDANT: (Over phone.) Yes, I'm here.

24 THE COURT: -- or we can do them separately,  
25 but that transferring venue would be a discretionary

1 matter. I'm not even sure there would be venue  
2 concerning Mr. Harris in the part of California you'd  
3 like me to send this, to the Eastern District of  
4 California.

5 But, you know, again looking at the indictment and  
6 the government's representations concerning the relevant  
7 facts, the defendant lives in Oregon, California is  
8 closer, but he doesn't live in the Eastern District of  
9 California. The corporate defendant now dismissed was  
10 in the Southern District of California. Many of the  
11 alleged co-conspirators, presumably witnesses, are here  
12 in Massachusetts. They're unindicted. None of them are  
13 in the Eastern District of California. So I'm not  
14 inclined to transfer the case there.

15 And I believe it's premature, in effect, for me to  
16 decide if the wire fraud statute is void for vagueness.  
17 Void for vagueness is decided facially when the claims  
18 are First Amendment claims.

19 And while you have talked somewhat about speech, I  
20 mean, the essence, I think, of the government's  
21 purported proof is not that it was unlawful for  
22 Mr. Harris to advocate rebellion on the internet, but,  
23 you know, to say, "Here's a device you can use to steal  
24 internet service without paying for it," you know, they  
25 say are doing certain things that would constitute



1 aiding and abetting. They may have to prove at trial  
2 that he actually knew these people. I don't know that  
3 you can aid and abet a crime that you're not aware is  
4 being committed.

5 MR. MCGINTY: Frankly this is the problem.  
6 Are we going to be in a better position four weeks or  
7 three weeks or two weeks into this case to resolve the  
8 issue when -- were there to be, let's say, candor about  
9 what the lay of the land is? And candor would be that  
10 there's going to be no proof offered for that.

11 THE COURT: Well, it's just very difficult.  
12 There's a Tenth Circuit case, **Reed**, where the parties --  
13 and I don't know if you cited **Reed** or not? (Pause.)  
14 No, you didn't. But it's very much on point. 114 F.3d  
15 1067 at 1070. And, you know, the government made a  
16 detailed proffer, the defendant didn't object to it, nor  
17 did he stipulate to the facts, um, and the First Circuit  
18 said, "You know, I understand why -- we understand why  
19 the judge was lured into doing this, but it's not  
20 proper. Until you have all the facts developed at  
21 trial, that you can't properly decide a void for  
22 vagueness challenge." So you may get, you know, a  
23 chance to try a case that you think you got a good shot  
24 of winning.

25 All right. What does the government want to say?

1 MS. SEDKY: Thank you, your Honor.

2 The government believes that Mr. McGinty, although  
3 he's a very passionate advocate for his client, is  
4 fundamentally mischaracterizing the 60-plus paragraph  
5 indictment that we've -- um, the superseding indictment.

6 This case is not about jail breaking, we haven't  
7 alleged jail breaking, this is not about capability and  
8 functionality and misuse, this is about purposeful  
9 design and intended use of a product to steal free and  
10 faster Internet access. And I'd like to take a moment  
11 just to focus the Court on the indictment itself, the  
12 four corners of the indictment.

13 And with the Court's indulgence, I would like to  
14 take a slight detour. There is some technical  
15 underpinnings of the indictment, we did flush it out of  
16 the indictment, but it is relevant to go to what this  
17 product functionality and design was and it elucidates  
18 Mr. Harris's intent and knowledge and purposeful  
19 conduct.

20 THE COURT: Okay.

21 MS. SEDKY: So Mr. Harris built a \$1 million  
22 commercial enterprise over the course of about 5 to 6  
23 years and the products -- there were a series of  
24 products that he released over time, um, starting with,  
25 I believe the first one was Sigma, then came Blackcat,

1     then came Sigma X, and there was a product called Coax  
2     Thief, that initially was a standalone add-on, and he  
3     later incorporated that into the functionality of Sigma  
4     X, and that was sort of his last product.

5             What the products did was they allowed a --  
6     through a buyer of the product or a user of the product,  
7     to, um, have a packet sniffer and a packet sniffer is  
8     essentially a software device that allows you to  
9     intercept packets that are going across a network. And  
10    this packet sniffer was designed to allow the user to  
11    pick up two things, a MAC address and a configuration  
12    file. And a MAC address, as Mr. McGinty has explained,  
13    is essentially a hardcoded serial number that a modem  
14    has on it. It's put in at the factory. The modem  
15    manufacturers take a lot of care to make sure that it  
16    cannot be changed. It is the primary identifier that  
17    ISPs use to determine that one of their users is a  
18    paying subscriber.

19            So the user turns on their computer, the MAC  
20    address beacons itself to the ISP, the ISP says, "Alas,  
21    I recognize this MAC address," the ISP then sends what's  
22    called a configuration file to what it thinks is a  
23    paying subscriber, and the configuration file  
24    essentially determines the band width speed of what that  
25    person is paying for.

1           And Mr. McGinty alluded to earlier "throttling  
2   service." The cable companies do offer tiered service  
3   and the reason they do that is because if I'm an ISP and  
4   I am sending cable access to your neighborhood, for  
5   example, there's a pipe essentially, it's like a  
6   physical pipe, and it has limited band width capacity,  
7   only so much band width can go through it at the same  
8   time, only so many electronic packets. So if there's a  
9   superuser in your neighborhood, your internet access is  
10   going to slow down, and the only way I can give  
11   everybody the internet access they're paying for, if  
12   I've got a superuser, is I have to build more pipes,  
13   which costs me money, and so I charge more money for  
14   people who are using faster service to try to titrate  
15   demand and make sure everybody's happy.

16           So there's limited band width through the pipe and  
17   I -- then the ISP delivers the kilobits per second for  
18   upstream and downstream, that's what's in the  
19   configuration file. And it's multitudes more expensive  
20   to get faster service. It's like tenfold more expensive  
21   to get superfast service. These are orders of  
22   magnitude, differences in price.

23           So what Mr. Harris designed, with help of a few  
24   others, is a product that allows the user to first sniff  
25   MAC addresses of his neighbors in hope that he gets a

1     paying subscriber's MAC address, then he uses that MAC  
2     address, and he can also sniff for config files, for  
3     configuration files, um, that the package sniffer was  
4     designed to pick up both.

5             There's a little bit of a technical twist here  
6     which is that you cannot use the same MAC address in the  
7     same neighborhood because you will kick off your  
8     neighbor from using internet access. So if I'm here and  
9     Mr. Bookbinder is in my neighborhood and I'm using --  
10    I've got my MAC going, I'm on-line, he sniffs my MAC  
11    address, tries to use it, I will get kicked off and the  
12    cable company will now know there's probably a cloned  
13    modem on his system.

14            So there needs to be a wide group of successful  
15    users to make these products work because they need to  
16    barter and exchange MAC addresses from different  
17    neighborhoods. I can use a MAC address from across the  
18    country or another part of town and the cable companies  
19    will not kick us off at the same time.

20            So what Mr. Harris did was, in addition to  
21    providing this sniffer program, he --

22            THE COURT: If you use somebody else's  
23    address, is there the risk or reality that that person  
24    will end up being charged more?

25            MS. SEDKY: Um, indirectly, yes. If I am a

1 freerider or somebody's network and I become a superuser  
2 because I've stolen a config file, my neighborhood is  
3 not set up to have 20 megabits per second of downstream  
4 activity -- let's say I'm downloading all these pirated  
5 movies, let's say, and they take a lot of bandwidth, and  
6 nobody knows about me because I'm not -- the cable  
7 company hasn't allocated for me, well, people will start  
8 complaining and say "My service is slow," "My service is  
9 slow," and if I'm using a MAC address of my neighbor,  
10 they'll say "I'm off the network," "I'm off the  
11 network." So the cable company has to come out and  
12 build more and have to -- they have to pass the costs  
13 off to the users.

14 So indirectly, yes, if I am using bandwidth, it's  
15 finite, the pipe is finite and the bandwidth is finite.  
16 And so there's this hermetically-sealed world of  
17 bandwidth essentially to a given neighborhood and now I  
18 need to disguise myself as another user, but I have to  
19 do it from a user across town or across country.

20 So we're all kind of -- we all need each other, we  
21 all need each other to be successful, we all need to be  
22 sniffing, we all need to be posting our MAC addresses on  
23 the website that Mr. Harris runs that he himself has  
24 used to solicit MAC addresses, and there has to be this  
25 give and take of config files and MAC addresses in order

1 for me to disguise myself as either a paying subscriber,  
2 which is the theft of service, or maybe I paid for the  
3 bottom, baseline cheap-o service, but I want superuser  
4 service, so I just steal the config file, I use my own  
5 MAC but I steal the config file.

6 So his products do two things, there's the packet  
7 sniffer component and then there's the MAC address  
8 config file changer component, which -- neither of which  
9 is an easy task. You'll here at trial, um, from people  
10 who make the modems, Motorola, and from people who are  
11 the ISPs, how unbelievably complicated these devices are  
12 to make -- to allow people to change their MAC addresses  
13 and change their config file. So that's in a nutshell  
14 what the products do.

15 And Mr. Harris's behavior vis-vis the products is  
16 not as Mr. McGinty would have characterized, "a guy who  
17 puts the products in the stream of commerce and walks  
18 away or sticks his head in the sand." He stayed very  
19 involved in this process. He stayed -- he was  
20 constantly eliciting user feedback from the user  
21 community to find out if his products were working  
22 because, as I said, he grossed a million dollars, he was  
23 making money selling these products, and he had -- this  
24 goes to the benefit question. His benefit was straight  
25 to his bottom line. He wanted to sell more products

1 and, um, so he had a financial incentive, among other  
2 incentives, to make sure that his products were being  
3 used successfully. So he not only had the MAC address  
4 sniffer --

5 THE COURT: That gives him a motive, but I  
6 don't understand it to be the government's theory that  
7 he was defrauding the purchasers of his product?

8 MS. SEDKY: No, that is not our theory, your  
9 Honor.

10 THE COURT: All right. So --

11 MS. SEDKY: Our theory is that he engaged in  
12 -- our conspiracy theory is that he engaged in a  
13 conspiracy with the -- with his TCNISO insiders and with  
14 his purchasers to defraud ISPs into providing free and  
15 faster service.

16 THE COURT: But one of the -- I thought the  
17 conspiracy with the people he knew, the people in his  
18 company who you call "insiders," was a fairly  
19 conventional allegation, um, but as far as I know none  
20 of them were in Massachusetts?

21 MS. SEDKY: That's correct.

22 THE COURT: So you're going to have to prove  
23 -- for venue, prove by a preponderance of the evidence,  
24 not beyond a reasonable doubt, but to prove at trial to  
25 the jury, I think, by a preponderance of the evidence,



1 um, that he was engaged in a conspiracy with somebody in  
2 Massachusetts, that is, that he had an agreement,  
3 express or inferred from conduct, um, to commit wire  
4 fraud with a person in Massachusetts and he intended  
5 that that person commit the wire fraud himself.

6 MS. SEDKY: That's exactly what we've alleged  
7 and we intend to prove at trial, your Honor. And in  
8 addition to our conspiracy count, we've alleged that he  
9 has engaged in a scheme with them, he's participated in  
10 a scheme to defraud, and he has aided and abetted them  
11 in a scheme to defraud. And at this point our theory of  
12 the case is really, "Look, we believe that the aiding  
13 and abetting charge is sort of subsumed within the  
14 substantive wire fraud charge and we intend to proceed  
15 on both theories."

16 THE COURT: Well, yeah, I think there's  
17 overlap. If you look at 18 United States Code, Section  
18 2, 2A is aiding and abetting and 2B is causation. Now,  
19 causation involves an innocent intermediary, so this is  
20 not quite the same. But you've charged that as part of  
21 the scheme he caused others to make wire transmissions.  
22 That, if it could be proven, if it is proven, would be  
23 sufficient.

24 But are you prepared to prove that he knew of the  
25 existence of these four alleged co-conspirators?

1 MS. SEDKY: Yes, your Honor. And we are also  
2 prepared to argue that he need not know the specifics of  
3 each user. That he need not --

4 THE COURT: Know who they are?

5 MS. SEDKY: Correct. We believe that --

6 THE COURT: But that -- that -- okay, you're  
7 going to be ordered to present a trial brief with jury  
8 instructions, and memos on jury instructions, these are  
9 just the type of things that I'm going to try to decide  
10 to the maximum extent possibly before trial. But at the  
11 moment, that doesn't sound right to me. Because you are  
12 going to have to prove that -- I mean, not -- a  
13 co-conspirator doesn't have to know every other member  
14 of the conspiracy or all the details of it. However,  
15 you know, to prove that a person conspired with another  
16 person, you have to prove a meeting of the minds between  
17 them and if Mr. Harris -- well, you'd have to prove that  
18 he had a meeting of the mind with somebody, you'd have  
19 to know at least one of them, and then you'd have to  
20 prove the others are in the same conspiracy.

21 MS. SEDKY: Well, I believe that we can prove  
22 -- I'm not ready to concede that we have to prove, but I  
23 believe that we will be able to prove that he was in  
24 charge of shipping the product -- this was essentially a  
25 one-man show. He was working out of his living room for

1 the most part. I think his wife helped him with the  
2 shipping and his roommate is a cooperator and from what  
3 we understand he is -- he was the guy who was in charge  
4 of the shipping and he also kept all of the records, the  
5 invoices. And so the invoices clearly show -- that's  
6 how we found these people, from looking at the  
7 defendant's own records. Who do we have in  
8 Massachusetts? We got the defendant's business records  
9 out and we started looking for Massachusetts and we  
10 found more users.

11 THE COURT: You've got to be able to prove  
12 that he communicated with these people, that he spoke to  
13 them or --

14 MS. SEDKY: Vis-vis Mr. Hanshaw, we will have,  
15 um, fairly robust communications with Mr. Hanshaw,  
16 directly with Mr. Harris, and also with his other  
17 co-conspirators, um, Ms. Linguist -- he had two other --  
18 the insider co-conspirators, um, Frank Philips and  
19 Isabela Linguist. And vis-vis the other three users, we  
20 will establish that their communications consisted of  
21 product ordering and shipment and the cable -- the  
22 satellite TV and the cable TV scrambler cases, um, I  
23 would submit to the Court, essentially stand for the  
24 proposition that you don't need more communications --  
25 that ordering and shipping is enough participation in

1 the scheme to make --

2 THE COURT: Are those conspiracy cases?

3 MS. SEDKY: Those are wire fraud cases.

4 THE COURT: Right. I mean, you could have a  
5 real problem with this conspiracy.

6 MS. SEDKY: Well, we believe that he certainly  
7 had business records that say the names of the  
8 Massachusetts --

9 THE COURT: He might have had, theoretically,  
10 four individual conspiracies, he might have conspired  
11 with four people in Massachusetts, but it doesn't mean  
12 that it was a single conspiracy. The standard  
13 instruction in Massachusetts, because it's a correct  
14 statement of law, is you have to prove the conspiracy  
15 charged in the indictment. And there are -- you know  
16 all about computers, but you all want to make sure you  
17 know all about conspiracy law, too.

18 MS. SEDKY: Well, the MAC address bartering  
19 that we were speaking about earlier, um, this particular  
20 business operation made all of the users interdependent  
21 on one another. This product could not stand alone. It  
22 couldn't work alone. You couldn't have one person  
23 sitting in his living room in Massachusetts and  
24 successfully use the packet sniffer and change the MAC  
25 address. They had to get a MAC address from somewhere

1 and it had to be from somewhere else.

2 THE COURT: Yeah, I haven't looked at it  
3 lately, but I'll probably go back and look at, say,  
4 **Grunwald**, which is a tax case. Sometimes people develop  
5 tax products and lots of people might use the same  
6 device, but it doesn't necessarily mean that they're  
7 conspiring with each other.

8 Well -- anyway. Go ahead. We're not there yet,  
9 but this is helpful.

10 MS. SEDKY: What I really wanted to do was to  
11 sort of help root the Court in the -- in some of the  
12 technical underpinnings of this type of product work  
13 because the key point that the product functionality  
14 really drives home is that it supports what we have  
15 alleged as Mr. Harris's intent and purposeful --

16 THE COURT: Okay, so why don't you go to the  
17 allegations in the indictment because that's the focus  
18 of the --

19 MS. SEDKY: That's fine. So our allegations  
20 have multiple references to Mr. Harris's purposeful  
21 conduct and it starts in Paragraph 1, for example. It  
22 says that his products -- this is, I believe, the second  
23 -- the third full sentence, "were designed to modify."  
24 Not merely capable of allowing misusers to modify, but  
25 designed to modify cable modems so that users could

1 obtain free internet access essentially.

2 Then we go to paragraph -- I essentially went  
3 through the indictment and Paragraph 11. So I guess --  
4 let me step back and say this.

5 The thrust of these allegations are he was  
6 designing and selling what he termed, he self-styled  
7 them as "cable modem-hacking products."

8 THE COURT: Cable modem what?

9 MS. SEDKY: "Cable modem-hacking products" is  
10 what he called them, and he is the one who named "Coax  
11 Thief." Coaxial cable is where the "coax" comes from  
12 and the "thief," I think, is pretty self evident.

13 So the cable modem hacking we've alleged in  
14 Paragraph 11 is altering software for the purposes of --  
15 not for the capability of, but for the purposes of  
16 obtaining Internet access without paying for it in order  
17 to steal service.

18 We go on, as the Court had pointed out, on  
19 Paragraph 15, the charging paragraph, the guts of the  
20 charging paragraph where the conspiracy talks about how  
21 he acted "knowingly, conspiring for the purposes of  
22 executing the scheme," "devising a scheme to defraud."  
23 Paragraph -- well, let's see. I think some of our other  
24 sort of really hit at home why are you doing --

25 THE COURT: Well, one of the things that

1 struck me, as I read it, you know, it starts at 16 and  
2 goes on, and these are just questions at this point, you  
3 talked about these products and services "enabling  
4 computer users to do various things."

5 MS. SEDKY: Right.

6 THE COURT: Are they -- Paragraph 19,  
7 "additional software tools that users could use to  
8 steal." That's relevant, um, but may not be enough, you  
9 have to prove something more specific, I think, with  
10 regard to Mr. Harris eventually.

11 MS. SEDKY: Well, I think that, taken as a  
12 whole, that Paragraph 26, for example, talks about his  
13 personal knowledge. He knew that his users successfully  
14 used his products to steal free and faster internet  
15 access. We go through all of the --

16 THE COURT: Yeah, we'll see. You're going to  
17 brief all of this. That may not --

18 MS. SEDKY: We believe.

19 THE COURT: Yeah, I know, but what I'm telling  
20 you is it may not be enough. If you get -- I don't know  
21 to what extent -- in the tax context, that I was  
22 addressing in **Pappathanase**, knowing that cash rebates  
23 could be used to illegally evade taxes didn't make  
24 somebody a co-conspirator. It was insufficient to know  
25 that it could be done, you'd have to -- the government

1 had to prove they knew it would be done, that it was  
2 being done.

3 MS. SEDKY: We understand that, your Honor,  
4 and we believe that we have alleged his purposeful  
5 knowing, willful conduct, we've used words like  
6 "design," "purposeful," and we believe that at trial, as  
7 I'm sure the Court recalls, the Court denied two motions  
8 to dismiss in that case and held off on the ruling for a  
9 Rule 29 motion. I think the bottom line is that  
10 everybody in this room agrees that this is the stuff of  
11 Rule 29 and we'll probably be hearing these same things  
12 in a few months.

13 THE COURT: But I want to make sure that I'm  
14 well-educated on what the law requires. Go ahead.

15 MS. SEDKY: That this case is about a product  
16 that has -- we will show at trial that this product had  
17 zero commercially-viable functionality that was  
18 legitimate. We will have users -- we will have his  
19 insiders come in and testify that this is what the  
20 product was designed to do. "I designed it," "that's  
21 how I designed it." The posts on his internet website  
22 talk about not only just his knowledge, but that there  
23 is no other use for this thing. We will have our  
24 witness from Motorola who makes diagnostic tools. We  
25 will have our witness from Charter who -- they were a



1 consumer of diagnostic tools. They will tell you that  
2 they have looked at this product and it is useless as a  
3 diagnostic tool. They would never buy it, it does not  
4 have any of the core functionalities of diagnostic  
5 tools.

6 THE COURT: All right. So they're going to  
7 give expert testimony, so I'm going to have to build  
8 into the schedule a time for the disclosure of expert  
9 reports.

10 MS. SEDKY: We just made our expert  
11 disclosures, your Honor. We're not necessarily  
12 conceding that they're experts, but in an abundance of  
13 caution we are complying with the expert discovery  
14 requirements.

15 THE COURT: That they're experts, that is not  
16 knowledge that a lay person knows and --

17 MS. SEDKY: Fair enough. Well, we just sent  
18 Mr. McGinty on Monday our expert discovery. And we plan  
19 on supplementing it. We have a few 302s.

20 THE COURT: Well, when I give you your trial  
21 schedule before you go home, remind me to build in time  
22 for the defendants to give you their expert reports and  
23 for any supplementation.

24 MS. SEDKY: We will, your Honor.

25 So we have the core functionality of the product,

1 we have Mr. Harris's ongoing and very active  
2 participation all along the five years of the scheme.  
3 As I alluded to earlier, the ISPs -- this device was the  
4 scourge of the ISPs. He was market leader in this  
5 space. They were very well aware of this product and  
6 they were spending significant resources trying to  
7 detect Sigma on its system and knock it off. And he had  
8 these platforms for users to say, "Hey, I can't get into  
9 Roadrunner," "I can't get into Comcast," "They're doing  
10 this, they're doing that," and he was all over those  
11 boards making -- finding out what troubleshooting was  
12 happening, who was getting detected and blocked, and  
13 then he, himself, or he would direct his coder, Isabela  
14 Linquist, to go figure out a work-around. He had this  
15 game of cat and mouse with the ISPs where they were --  
16 he needed to stay one step ahead of the ISPs, otherwise  
17 his products had no commercial viability. So he had to  
18 stay involved.

19 He also had to keep a fresh supply of MAC  
20 addresses going because a lot of times the ISPs would  
21 figure out that a MAC address had been cloned and they  
22 would blacklist it. So there was a very continual and  
23 active involvement that Mr. Harris played that we submit  
24 is another way to infer his intent. He was not a guy  
25 who put in a benign product that was misused by

1       wrongdoing third-party interveners. He designed a  
2       product that had no other commercial use.

3               We will also show at trial that he himself used it  
4       to steal internet access and that goes to his own  
5       intent, not just knowledge, and that he knew and he took  
6       lots of steps to hide himself and hide his involvement.  
7       People will describe him as paranoid and taking all  
8       kinds of steps to make sure that no one knew where he  
9       went or what his name was. And these are all factors  
10      that the courts have looked at in determining what's the  
11      plus factor that gets you out of the buyer-seller  
12      conspiracy and into a real intent criminal conspiracy.

13              THE COURT: Well, that's what I want to be  
14      educated on.

15              MR. MCGINTY: Could I just say something?

16              THE COURT: Well, I don't know if Ms. Sedky is  
17      finished.

18              MS. SEDKY: Well, I wanted to just close, um,  
19      after I consult with my co-counsel to make sure I  
20      haven't missed anything, I wanted to close by now that  
21      we've looked at the indictment itself, I would like to  
22      turn for a moment to what an incredibly heavy burden the  
23      defendant has at this stage of a Rule 12 motion and we  
24      submit that the defendant can't meet this burden.

25              What the defendant has to do is look at the

1 indictment and say, "Here are the elements of conspiracy  
2 and here are the elements of the wire fraud," whether by  
3 case law or jury instructions or statute, whatever, and  
4 "Here's the indictment and it's not there." And the  
5 defendant hasn't done that today, your Honor, and the  
6 defendant hasn't done it because he can't do it, because  
7 we have more than amply alleged conspiracy and wire  
8 fraud. There's nothing missing from our indictment.

9 THE COURT: Well, you don't have to just  
10 allege conspiracy and wire fraud, you have to allege  
11 facts that would establish venue in Massachusetts, which  
12 I think you've done.

13 MS. SEDKY: We have a 60 paragraph speaking  
14 indictment here that has more than enough to satisfy a  
15 Rule 12 motion. And really I started counting in the  
16 defendant's brief --

17 THE COURT: There are only a handful of those  
18 60 that are really important for this analysis. But go  
19 ahead.

20 MS. SEDKY: Well, many of the overt acts are  
21 actually Massachusetts based and the wires --

22 THE COURT: Well, I don't -- maybe they're  
23 meant to say that. It wasn't --

24 MS. SEDKY: Well, I mean, all of the  
25 Massachusetts users, when they were accessing the

1 internet, those were -- I believe we alleged those as  
2 overt acts and they were sitting in Massachusetts --

3 THE COURT: Look, they're overt acts, but it  
4 doesn't -- it's not perfectly clear. If you go to, say,  
5 43, 43 to 47 are JL?

6 MS. SEDKY: Yes.

7 THE COURT: Well, the first one says he was in  
8 Massachusetts, but the others don't tell me --

9 MS. SEDKY: I apologize, your Honor.

10 THE COURT: Well, actually, 44 does,  
11 "Massachusetts." All right. That's fine.

12 MS. SEDKY: The ISPs were all in Massachusetts  
13 and the ordering and equipment was all in  
14 Massachusetts. And I believe that in the wire fraud  
15 substantive counts where we talk about wires 2 through  
16 11, we talk specifically about being from Massachusetts,  
17 vis-vis the venue for wire fraud.

18 THE COURT: That's right. Okay.

19 MS. SEDKY: So he has a very heavy burden  
20 here. We would submit that he hasn't met it. And  
21 really the gist of his argument is a sufficiency of the  
22 evidence argument and that this is a procedurally  
23 improper motion for that type of an argument.

24 THE COURT: Okay. Mr. McGinty, do you want to  
25 reply briefly?

1 (Pause.)

2 THE COURT: You don't have to.

3 MR. MCGINTY: Well, the --

4 THE COURT: You could surprise us.

5 MR. MCGINTY: Could I say this out loud,  
6 because I've said it in briefings on numerous occasions,  
7 and that is, what is the case -- just one case. What is  
8 the case that supports, um, criminal liability -- not  
9 civil liability, but criminal liability of a product  
10 seller for the conduct of third parties? And I have  
11 searched -- I mean, this has been sort of painstaking,  
12 trying to find where it is that's the foundation for the  
13 predicate for that kind of criminal liability exists? I  
14 got hints of it in terms of contributory liability, I  
15 have nothing in the issues that address square-on for  
16 the purposes of a criminal case.

17 So this case is, in a lot of ways, seminal in that  
18 --

19 THE COURT: Well, is that really right?  
20 Wasn't the defendant convicted in **Direct Sales**?

21 MR. MCGINTY: Well, that's interesting  
22 because, um, perhaps the view of **Direct Sales** and of  
23 **Falcone** was different. That the difference between  
24 those two, and the Supreme Court was quite careful  
25 there, in **Falcone**, to say that if you sell things that

1 are legal, um, the amount of proof that -- not that you  
2 knew how it was going to be used, but you were a  
3 participant in what they were doing, has to be so high.

4 And along comes, to sort of pare it out comes  
5 **Direct Sales** and in **Direct Sales** the Court said, um,  
6 that the difference here is that narcotics are  
7 restricted items and with the restriction comes, and in  
8 **Direct Sales** it was, he was -- the company was warned  
9 not to make sales in the volume they were doing, um,  
10 they were warned that they were involved with items that  
11 were restricted and controlled by the predecessor, DEA,  
12 um, they were selling in lots that exceeded any  
13 reasonable amount of the -- in other words, the conduct  
14 was such that even though the sale of the item had  
15 otherwise been lawful, the conduct reached into a  
16 category of egregious conduct. And the difference  
17 between **Falcone** and **Direct Sales** was the difference  
18 between an item that is unrestricted and in **Direct Sales**  
19 was restricted.

20 Here you have an unrestricted item. There is  
21 nothing that makes the sale of this unlawful. Let's  
22 assume that everything the government says about the  
23 capability of the item is true. What is the thing that  
24 makes it unlawful to sell, the thing that can be misused  
25 by a third party? And frankly, your Honor, the list of

1 things is pretty staggering.

2 For example, on the internet, one can find for  
3 sale keystroke counters. Keystroke counters are the  
4 things that defeat, um, codes, that permit you access to  
5 confidential -- that permit access to confidential  
6 documents, that permit you to get credit card numbers  
7 sold on the internet. There are -- there are other  
8 items like this that are sold on the internet that  
9 companies believe that they can sell lawfully. They are  
10 not answerable to the consequence of the matter of the  
11 use. And we've cited in there the Metasploit program.  
12 They're talking about whether Harris got affirmative,  
13 um, information about the manner in which his products  
14 were being used. In the Metasploit program, which is  
15 released by the Rapid7 company in Massachusetts, um, the  
16 information that they get back is they're the Number 1  
17 hacking tool internationally, um, breaching security  
18 in --

19 THE COURT: Well, we're going to have to  
20 stop. I've got another matter shortly and we've got  
21 more after that. What I have in mind from **Direct Sales**,  
22 and they did make a distinction between regulated  
23 morphine and nonregulated ingredients that can go into  
24 moonshine, but they said: "Petitioner obviously  
25 misconstrues the effect of the **Falcone** decision in one



1     respect. This is in regarding it as deciding that one  
2     who sells to another with knowledge that the buyer would  
3     use the article for an illegal purpose cannot, under any  
4     circumstances, be found guilty of conspiracy with the  
5     buyer to further his illegal act. The **Falcone** case  
6     creates no such sweeping insulation to sellers to known  
7     illicit users. The decision comes down merely to this.  
8     That one does not become a party to a conspiracy by  
9     aiding and abetting it, through sales or supplies or  
10    otherwise, unless he knows of the conspiracy and the  
11    inference of such knowledge cannot be drawn merely from  
12    knowledge the buyer will use the goods illegally."

13         So to the extent you're arguing that the  
14    government's going to have to prove more than that  
15    Mr. Harris sold particular people devices he knew could  
16    or this suggests would be used illegally, um, it looks,  
17    at the moment -- and all of this is subject to  
18    evolution, that **Direct Sales** says "You're right." On  
19    the other hand, the government says they recognize  
20    they've got a burden and they'll provide proof to  
21    satisfy it. But the mere fact that this is a buyer --  
22    what you characterize as a buyer-seller relationship and  
23    they characterize as a conspiracy or people engaging in  
24    a common scheme. But the mere fact that if it were a  
25    buyer-seller relationship is not the end of the inquiry,

1       you have to know what else, and there has to be a trial.

2             Okay. I'm going to give you --

3             MR. MCGINTY: Your Honor, can we address the  
4       trial date?

5             THE COURT: No, no, I'm going to explain my  
6       reasoning. Yeah, then we will discuss the trial date.  
7       But you've got to listen to this for a minute -- a few  
8       minutes.

9             I'm denying the motion to dismiss for lack of  
10       venue. I'm denying the request for a change of venue.  
11       I'm denying the request to find the applicable statutes  
12       void for vagueness.

13            The motion to dismiss for lack of venue is made  
14       under Rule 12(b)(2), which applies to motions that the  
15       Court can decide without a trial of the general issue.  
16       Rule 12(d) permits deferring a decision for good cause.

17            As I pointed out to you in October, the First  
18       Circuit addressed the standards very helpfully and  
19       importantly in **Barletta**, 644 F.2d 50 at 58. It teaches  
20       that the Court must defer deciding the motion to dismiss  
21       if it requires a review of substantially all of the  
22       evidence to be introduced at trial. The Court may defer  
23       a decision if it requires more than a de minimis review  
24       of the evidence.

25            Generally the government has the burden of proving

1 venue at trial by a preponderance of the evidence. The  
2 First Circuit has said that in **Salinas**, 373 F.3d 161 at  
3 163 to 164, and **Scott**, 270 F.3d 30 at 34 to 35, and in  
4 **Lanoue**, 137 F.3d 656 at 661. However, generally if  
5 venue is challenged before trial, the decision is based  
6 on the allegations in the indictment. This was held by  
7 the Ninth Circuit in **Jensen**, 93 F.3d 667, and there are  
8 a number of District Court decisions reaching the same  
9 conclusion, **Ohle**, 678 F.Supp. 2d 215 at 231 to 232,  
10 **Dorceant**, 2010 Westlaw 3122814 at 3, a New Hampshire  
11 case, and **Motz**, 652 F.Supp.2d 284 at 290.

12 The First Circuit has suggested that if facts  
13 essential to a venue determination are not in dispute,  
14 the issue may be decided before trial. That's **Arteaga**,  
15 102 Federal Appendix 731.

16 The defendant agrees that the issue should be  
17 decided now on the face of the indictment. 18 United  
18 States Code, Section 3237, provides that venue exists  
19 where a continuing crime has begun, continued or was  
20 completed. Generally venue exists where any essential  
21 conduct element of the crime charged occurred, as the  
22 Supreme Court said in **Rodriguez-Moreno**, 526 U.S. 275 at  
23 280. The First Circuit has stated that if the crime  
24 consists of distinct parts taking place in different  
25 localities, then venue is proper wherever any part can

1 be proved to have taken place. That's **Scott**, 270 F.3d  
2 30 at 35.

3 In a conspiracy case, venue is proper in any  
4 district in which an act in furtherance of a conspiracy  
5 has taken place even if a particular co-conspirator was  
6 not himself present in the district. That's the holding  
7 of **Santiago**, 83 F.3d 20 at 25.

8 In a wire fraud case, venue exists where the wire  
9 transmission originated, passed through or was received,  
10 as the Ninth Circuit held in **Pace**, 314 F.3d 344 at 349  
11 to 350. This includes districts in which the defendant  
12 caused wire transmissions to be made, as the Second  
13 Circuit explained in **Kim**, 246 F.3d 186 at 191 to 193. A  
14 defendant charged with aiding and abetting under 18  
15 United States Code, Section 2A, may be prosecuted not  
16 only where he committed accessory acts, but also where  
17 the principal committed the substantive crime, as the  
18 First Circuit said in **Griffin**, 814 F.2d 806 at 810.

19 The indictment in this case alleges the essential  
20 elements of conspiracy and wire fraud and also includes  
21 allegations that, for present purposes, indicate that  
22 venue is proper in Massachusetts. The charging count of  
23 Count 1, the conspiracy count, is in Paragraph 15. It  
24 charges that from approximately 2003 to approximately  
25 August of 2009, in the District of Massachusetts, Ryan

1 Harris and others known and unknown to the grand jury  
2 did knowingly conspire to commit mail fraud -- I'm  
3 sorry, wire fraud, and it explains how. It's well  
4 established in the First Circuit that to prove that  
5 charge, the government will have to prove that the  
6 defendant, Ryan Harris, intended to agree with another  
7 person, who I expect will have to be identified, to  
8 commit wire fraud and intended that the wire fraud be  
9 committed. Count 1 also alleges that in furtherance of  
10 that conspiracy several overt acts occurred in  
11 Massachusetts. Some of the paragraphs making such  
12 allegations are 37, 43, 52 and 56.

13 Counts 2 through 11 charge that Mr. Harris  
14 committed wire fraud or aided and abetted wire fraud.  
15 The essential elements of wire fraud are stated, alleged  
16 in Paragraph 60. It's alleged that in the District of  
17 Massachusetts and elsewhere, Ryan Harris, having  
18 knowingly devised a scheme to defraud or to obtain money  
19 or property by means of material false and fraudulent  
20 pretenses, representations and promises transmitted and  
21 caused to be transmitted in interstate commerce certain  
22 wire communications. Counts 2 through 11 each allege  
23 wire transmissions as part of that scheme originating in  
24 Massachusetts.

25 As I said, it's charged that the defendant caused

1 each transmission as part of his scheme to defraud or  
2 aided and abetted the principal committing the crime.  
3 Therefore, for present purposes venue is adequately  
4 established. It will, however, have to be proven by a  
5 preponderance of the evidence at trial.

6 The defendant relies on *Falcone vs. United States*,  
7 311 U.S. 205, and *Direct Sales vs. United States*, in an  
8 effort to argue that the indictment fails to state a  
9 claim on which he can be convicted.

10 In *Falcone*, the Supreme Court held that "one who  
11 without more furnishes supplies to an illicit distiller  
12 is not guilty of conspiracy even though his sale may  
13 have furthered the object of a conspiracy to which the  
14 distiller was a party but of which the supplier had no  
15 knowledge." That's 311 U.S. at 210 to 211.

16 In *Direct Sales*, a drug wholesaler that had  
17 supplied large quantities of morphine sulfate to a  
18 small-town doctor challenged a conviction for a  
19 conspiracy to violate the narcotics laws. The Supreme  
20 Court found that the defendant, as I said earlier,  
21 "obviously misconstrued the effect of the *Falcone*  
22 decision in regarding it as deciding that one who sells  
23 to another with knowledge that the buyer will use the  
24 article for an illegal purpose cannot, under any  
25 circumstances, be found guilty of conspiracy with the

1 buyer to further his illegal end. The **Falcone** case  
2 creates no such sweeping insulation for sellers to known  
3 illicit users," the Supreme Court said in 319 U.S. at  
4 709.

5 Instead, the Court found sufficient evidence  
6 existed in the case before it to support a conclusion  
7 that the defendant had the requisite intent, conspired  
8 with a physician, based on a large -- based to a large  
9 degree on continuous high-volume sales of a restricted  
10 drug and the wholesaler's actions to stimulate  
11 additional high-volume sales to the physician. The  
12 Court observed that it had not been asked in **Falcone** to  
13 decide whether the evidence was sufficient to sustain a  
14 conviction for conspiracy between the buyer and the  
15 seller in that case. Rather, the **Falcone** court found  
16 that "one does not become a party to a conspiracy by  
17 aiding and abetting it through sales or supplies or  
18 otherwise, unless he knows of the conspiracy."

19 The cases cited by the defendant indicate to me at  
20 this point that a buyer-seller relationship is not  
21 enough, by itself, to establish a conspiracy. As the  
22 Supreme Court said in **Direct Sales** at 712, "not every  
23 instance of sale of restricted goods, harmful as are  
24 opiates, in which the seller knows the buyer intends to  
25 use them unlawfully will support a charge of

1       conspiracy."

2               This is a concept that will have to be developed  
3       as we get toward trial, but essentially **Falcone** and  
4       **Direct Sales** demonstrate that determining whether, in  
5       this case, a crime has been committed in Massachusetts  
6       is a very fact-intensive inquiry and the question of  
7       venue cannot be properly or conclusively decided without  
8       trying the case.

9               I've also considered the motion to exercise my  
10       discretion to transfer the case to the Eastern District  
11       of California, which, as I said, I'm also denying.

12              There are a series of factors to be considered and  
13       some of them are summarized well in **Motz**, 652 F.Supp. 2d  
14       at 290. I've considered them, but in this case I find  
15       it's not proper to, or appropriate, to transfer the case  
16       to the Eastern District of California under Rule 21(b).  
17       I actually have a question as to whether venue would lie  
18       there. But as a matter of discretion, I'm relying on  
19       the facts that the defendant does not live in the  
20       Eastern District of California. His company was not  
21       based there, it was based in the Southern District of  
22       California. Many of the alleged co-conspirators and  
23       presumably the witnesses are in Massachusetts and none  
24       are in the Eastern District of California.

25              I also find that it's premature to decide whether



1 the wire fraud statute on which Counts 2 through 11 rest  
2 is void for vagueness. "To satisfy due process a penal  
3 statute must define a criminal offense, one, with  
4 sufficient definiteness that ordinary people can  
5 understand what conduct is prohibited and, two, in a  
6 manner that does not encourage arbitrary and  
7 discriminatory enforcement," as the Supreme Court  
8 recently said in **Skilling**, 130 S.Ct 2896 at 2928. As  
9 the Supreme Court -- well, the First Circuit, at least,  
10 has recognized, "many statutes will have some inherent  
11 vagueness, but a statute is unconstitutionally vague  
12 only if it prohibits an act in terms so uncertain that  
13 persons of average intelligence would have no choice but  
14 to guess at its meaning and modes of application."  
15 That's **Councilman**, 418 F.3d 67 at 84.

16 "Outside the First Amendment context, a party has  
17 standing to raise a vagueness challenge only insofar as  
18 the statute is vague as applied to his or her specific  
19 conduct." That's **Pungitore**, 910 F.2d 1084. A vagueness  
20 challenge not implicating the First Amendment is thus  
21 "limited by the framework of the specific facts in the  
22 record of the case," **Maquardo**, 149 F.3d at 42, and **Reed**,  
23 114 F.3d at 1067 and 1070.

24 Essentially the claim of void for vagueness has to  
25 be addressed in the context of the evidence presented at

1 trial. This was discussed in a way very relevant to the  
2 instant case in **Reed**, by the Tenth Circuit, 114 F.3d at  
3 1070. So this, like the venue question, is one that  
4 will need to be revisited.

5 All right. Let me have your book. Now, when I  
6 saw you in October, I did give you a trial date of  
7 February 6th. My schedule has evolved in a way that  
8 doesn't permit me to start on February 6th. Unless  
9 we're going to start much earlier than that, um, we're  
10 going to need to start by February 21st, because that's  
11 when I can put aside the three weeks necessary to try  
12 the case.

13 So, Mr. McGinty, I asked Mr. Hohler to tell you  
14 that, I think, yesterday. I understand you had a  
15 concern relating to a witness in another case. I'll  
16 hear you, but --

17 MR. MCGINTY: Well, it's a little more  
18 complicated than that. I have a case starting in mid  
19 April with Judge Stearns that involves witnesses coming  
20 in from Rwanda. Um, there will be a parallel case  
21 relating to a family member that's up in New Hampshire  
22 that's starting on February 22nd, I understand. Um,  
23 that trial will involve persons coming over from Rwanda  
24 whom I hope to meet with, to interview, and ultimately  
25 to see testify during a trial that's probably going to

1 run three weeks up there.

2 The concurrence of this case with that one would  
3 mean that I would be unable to do that and that would  
4 diminish my ability to represent my client.

5 THE COURT: Well, you know, we're going to be  
6 sitting from 9:00 till 1:00. I know it's hard to go on  
7 two tracks. But I can't accommodate your concern.  
8 You've got weekends, you've got evenings, you've got  
9 colleagues, so, you know, we're going to start on the  
10 21st.

11 Can you give him the trial order, please.

12 (Pause.)

13 THE COURT: All right. The trial is going to  
14 commence on February 21st.

15 (Pause.)

16 THE COURT: Does the government understand  
17 that it has a duty to disclose all material exculpatory  
18 information, whether it's written or unwritten, and  
19 whether it negates guilt or just challenges the  
20 credibility of evidence that the government wishes to  
21 present?

22 MR. BOOKBINDER: We do, your Honor.

23 THE COURT: And do you understand that I  
24 define "materiality" the way Judge Paul Freedman defined  
25 it in his **Safavian** decision in the District of Columbia

1 and not the way the government sometimes argues it  
2 should be? So you want to take a look at **Safavian**.

3 Do you understand you have an obligation to go to  
4 all the agencies that participate in the investigation  
5 to find any material exculpatory information whether  
6 it's written down or not?

7 MR. BOOKBINDER: We do, your Honor.

8 THE COURT: All right. And finally do you  
9 understand that that's a continuing obligation, so if  
10 you interview a witness, for example, and he or she says  
11 something inconsistent with what he or she said before,  
12 um, that needs to be turned over?

13 MR. BOOKBINDER: We do, your Honor.

14 THE COURT: All right. Well, I'll give you  
15 until January 20th. This is Paragraph 3.

16 Does the government have any Rule 404(b) evidence  
17 that it expects to present?

18 MR. BOOKBINDER: Your Honor, we may. Um, to  
19 the extent that Mr. Harris's own use of a modified  
20 modem, basically one of the products he was selling, his  
21 use of it to essentially steal internet access, um, that  
22 may constitute evidence under Rule 404(b).

23 THE COURT: Okay.

24 MR. BOOKBINDER: And there's one other.

25 THE COURT: Go ahead.

1 MR. BOOKBINDER: One other piece of  
2 information, which is that, um, as you know there is a  
3 -- there's a tax investigation not yet charged, um,  
4 centered around Mr. Harris's failure to report any of  
5 the income that he earned as a result of this  
6 enterprise. That is -- um, we haven't sort of finalized  
7 what our plan is, but if we're intending to use that --  
8 that certainly, if we're going to use it affirmatively  
9 in our case in chief, it might well be 404(b) evidence  
10 as well, your Honor.

11 THE COURT: All right. Well, in fact, for  
12 these, you've got until January 20th to make that  
13 decision and explain it to the defendant.

14 Are the parties agreeable to exchanging **Jencks**  
15 statements a week before the trial?

16 MR. BOOKBINDER: We certainly are, your Honor.

17 MR. MCGINTY: Your Honor, I would ask for a  
18 week earlier for the government and I have to review  
19 their **Jencks** before I can respond to them. One of the  
20 complications here is that --

21 THE COURT: Well, wait.

22 MR. MCGINTY: Well, I would ask that it would  
23 be staggered, that they would be a week before us,  
24 before we would have to evaluate those.

25 THE COURT: Why? I mean, if the question is

1       whether you have the statements, if you have --

2               MR. MCGINTY: Right, but whether they're  
3       **Jencks** depends on whether I call the witness and whether  
4       I call the witness depends on what they're offering and  
5       there's uncertainty, among other things. I don't mean  
6       to be coy, but I --

7               THE COURT: Well, does the government have any  
8       objection to that?

9               MR. BOOKBINDER: Your Honor, as a practical  
10       matter, to the extent we have **Jencks** material, at this  
11       point, we've already turned it over, we will continue to  
12       do so. We don't have any objection if you want us to  
13       order it two weeks before.

14              THE COURT: Okay. So the government will need  
15       to turn it over by February, let's say, 3rd, and the  
16       defendant by February 10. And I want you to put  
17       together, please, a set of the **Jencks** for me, um, as  
18       well as sets of the exhibits, one for the Court -- I  
19       mean, one for the file and one that I can write on.

20              All right. Now, Mr. McGinty.

21              MR. MCGINTY: The complication here, your  
22       Honor, is that -- such as the breathe of Count 1, that  
23       in response to a discovery letter that we submitted to  
24       the government, they indicated that users had discussed  
25       or attempted to access many ISPs, including the

1 following, and there was a list of probably 20 of them,  
2 and then it said that the list may expand as the agents  
3 speak to additional customers.

4 The difficulty with Count 1 is its expanse, it not  
5 only contemplates ISPs, um, it not only anticipates  
6 customers who use these ISPs, it also anticipates users  
7 who use the software for purpose of accessing ISPs. Um,  
8 we haven't gotten discovery that would flesh out what  
9 the scope of that conspiracy is and frankly one of the  
10 reasons that we challenge this in a motion to dismiss is  
11 in the hopes of trimming -- shall we say trimming this  
12 to some kind of manageable dimension. Right now --

13 THE COURT: Well, what you didn't give me,  
14 that I thought you might, and I don't know how I would  
15 have acted on it, is a motion for a bill of particulars,  
16 but you didn't file that motion.

17 MR. MCGINTY: Well, what we had done is we had  
18 asked for a bill of particulars early on in the case,  
19 but we hadn't, um, pressed it because the answer was,  
20 "Here's the ISPs, but more information needs to be  
21 developed." So now that the case is sort of marching on  
22 to its trial, what's the boundary of the, um, the  
23 allegedly injured ISPs and what's the proof going to be  
24 that it was accessed at a discernible time by a  
25 discernible person?

1 THE COURT: I'm soon going to order them to  
2 file a trial brief and I'm hoping that this will help.  
3 But you've got the dates to put in Paragraph 4.

4 MR. BOOKBINDER: Your Honor, on the **Jencks**  
5 issue, we're happy to provide the Court with a copy, I  
6 just want to warn your Honor that because we have  
7 defined **Jencks** very broadly, um, we're talking about  
8 probably at least a thousand pages of stuff. I'm happy  
9 to give it to the court as long as --

10 THE COURT: You don't have to give it to me  
11 far in advance, but by the time the trial approaches,  
12 basically I'm going to want to have the **Jencks** for each  
13 witness as the witness testifies. If they were in the  
14 grand jury, you know, I want to be able to look up a  
15 transcript. Sometimes I look at it before the witness  
16 testifies, sometimes I just have it on the bench so I  
17 can rule on a better-informed basis.

18 MR. BOOKBINDER: And, your Honor, that's a  
19 narrow -- really the bulk of what we produced is  
20 probably not **Jencks**, but it's essentially all of the  
21 e-mail written by the agents who may testify, that's  
22 what is --

23 THE COURT: Well, that would be **Jencks** if it's  
24 relevant to the case.

25 MR. BOOKBINDER: Again we're sort of broader



1       than what's really relevant to their testimony. But we  
2       can give it to the Court now, if you would like it, or  
3       just more traditional witness statements.

4               THE COURT: I encourage you to be expansive.

5               MR. BOOKBINDER: Then we'll do that then, your  
6       Honor.

7               THE COURT: Thank you. We have a spacious  
8       courtroom. We'll find a space for it. But this is  
9       important.

10              There are issues that -- I want to give you a date  
11      for these filings, voir dire questions, jury  
12      instructions, motions in limine, and supported memos and  
13      trial briefs that's early enough, because now the trial  
14      has been moved back.

15              (Pause.)

16              THE COURT: I want those filings to be made on  
17      January 13th and the responses to be filed say by  
18      January 25th to the motions in limine. And I also am  
19      ordering that you file, with the proposed jury  
20      instructions, memoranda, um, the hard issues, explaining  
21      your positions. It could be in the trial brief. But, I  
22      mean, this is -- this isn't the conventional conspiracy  
23      or mail fraud case. We have to take the general  
24      familiar principles and figure out how they apply here.

25              You know, I did -- I do -- you've answered this

1 somewhat today, but I think there are two overlapping  
2 theories of mail fraud that the government has. One is  
3 that Mr. Harris, with others similar to the conspiracy,  
4 participated in devising the scheme and caused wire  
5 transmissions to be made. The other is not that he did  
6 everything necessary to commit wire fraud himself, but  
7 he knew that particular people were committing wire  
8 fraud and aided and abetted, deliberately did something  
9 to help it succeed with the state of mind necessary to  
10 convict a person of wire fraud. So you want to -- and  
11 **Potter** may be a case that has some significance in the  
12 scheme to defraud.

13 I'm directing that you address the issue of  
14 whether the government has to prove that the -- that an  
15 alleged wire fraud was a scheme to get money for  
16 Mr. Harris himself. I don't -- beyond, you know,  
17 selling people his products. Or whether it would be  
18 sufficient if he aided and abetted a scheme by another  
19 person intended solely to enrich that other person.

20 As I told you, if you take a look at my  
21 instructions in **DiMasi**, and we'll make them available  
22 for you, um, but I did instruct, for the honest services  
23 mail and wire fraud, that the government had to prove  
24 that DiMasi personally would benefit from the payments.  
25 However, it was alleged in the indictment that DiMasi

1       caused these payments to be made for his benefit, not  
2       just that he caused them to be made. And the government  
3       originally accepted that burden and only at the end of  
4       the 7-week trial tried to change its mind. But I'm not  
5       sure that the law requires that. For extortion it  
6       doesn't, um, Hobbs Act extortion.

7               Then I gave you the **Pappathanase** decision in  
8       which, you know, raises issues about the nature of any  
9       conspiracy. The conspiracy charged here, as I  
10      understand it, is not just between Mr. Harris and people  
11      in California and not just Mr. Harris and one person in  
12      Massachusetts, but it's alleged that all those -- that  
13      all four of them in Massachusetts were part of the same  
14      conspiracy. And if the government doesn't intend to  
15      prove that, I need to find out soon. If the government  
16      does intend to prove that, you know, at some point  
17      proving a different conspiracy arguably will be a fatal  
18      variance.

19             And then this I'd like some immediate guidance on,  
20      but it's got to be addressed further. Will the  
21      government be seeking **Petrozziello** co-conspirator  
22      hearsay rulings?

23             MR. BOOKBINDER: We will, your Honor.

24             THE COURT: Well, they don't have to be  
25      statements by the same person or statements made in

1 furtherance of the same conspiracy, but, you know,  
2 frequently I'll conditionally admit something. But I'm  
3 going to need a very detailed proffer. You need to  
4 identify every person for whom you hope to get in  
5 co-conspirator hearsay statements against Mr. Harris and  
6 tell me -- the defendant, in detail what the evidence is  
7 that will ultimately prove by a preponderance of the  
8 evidence that that person was in a conspiracy with  
9 Mr. Harris when he made the statement and the statement  
10 was in furtherance of the conspiracy. Because -- and I  
11 have the discretion to conduct a pretrial hearing on  
12 this.

13 But what I absolutely don't want or intend to do  
14 is conditionally admit a lot of testimony and then find  
15 that the government hasn't proven by a preponderance of  
16 the evidence what it has to prove because then you're  
17 going to have a foreseeable motion for a mistrial and  
18 problems with that. I'm going to try this case for  
19 three weeks. I don't want the jury to hear anything  
20 that I don't have good reason to believe is ultimately  
21 going to prove to be admissible. So this relates to my  
22 concerns about what the conspiracy is.

23 Well, that's it. Then I think I'm going to plan  
24 to start seeing you on those dates that we have, the 7th  
25 or 8th probably.

1 But in any event, um, the government's turning  
2 over its -- essentially you're telling who the witnesses  
3 are, right, because the other -- I'll give you a date  
4 for this, 6. But what I want the parties to do, both  
5 parties, is to organize their exhibits in some way, and  
6 it doesn't have to be the way you number them, but you  
7 know what witness you're going to try to get them in  
8 through. And you're going to exchange the exhibits and  
9 then you're going to tell me which exhibits are objected  
10 to and I'll know what witnesses they're associated with  
11 so we can take them up in some logical order and the  
12 trial can progress.

13 So, you know, if the government gets more  
14 exhibits, it can supplement them, but --

15 Does the government think it would have --

16 (Pause.)

17 THE COURT: Does the government think it would  
18 have a problem providing those exhibits say by January  
19 13th, also?

20 MR. BOOKBINDER: Your Honor, with the briefing  
21 that the Court expects and the holidays --

22 THE COURT: It's too much? Okay.

23 MR. BOOKBINDER: If we could step back a bit?

24 THE COURT: Yes, we can. We can. How about a  
25 week later, would that work?

1 MR. BOOKBINDER: Let's try that.

2 THE COURT: Yes. And, in fact, I think  
3 Mr. McGinty's going to tell me that he can't do it until  
4 he sees yours, right?

5 MR. MCGINTY: It seems prudent.

6 THE COURT: All right. The defendants are to  
7 do the same by the 27th. And those are the dates that  
8 the government should provide its witness list, it could  
9 be supplemented, and the exhibits. And to the extent  
10 you can, tell them what witness the exhibits are  
11 associated with.

12 MR. BOOKBINDER: Your Honor, I think that  
13 makes sense. We can try to number them by witness. If  
14 we can't, just a technical question on that. I found in  
15 the past it's often helpful to kind of leaves gaps in  
16 numbering so that we can supplement and exhibits can  
17 still sort of be in groups, but if the Court would  
18 prefer them to be sequential from the outset, we'll add  
19 things at the end and --

20 THE COURT: Just add them at the end.

21 MR. BOOKBINDER: That's fine.

22 THE COURT: And then the defendants -- I mean,  
23 it may end up -- here, the defendants should number  
24 theirs at the end of the government's, I think. And  
25 then if the government gets more, you can put them after

1     that.   So the 20th and the 27th.   And then I would say  
2     --

3                 MR. BOOKBINDER:   Your Honor, one more question  
4     on that?   It sounds like you don't want these exhibits  
5     marked "Government's Exhibit," but just plain numbers?

6                 THE COURT:   Yeah, just numbers.

7                 MR. BOOKBINDER:   All right.

8                 THE COURT:   I mean, you can do it, but I think  
9     now with all the electronics it's just better -- well,  
10    we'll put our own stickers on them eventually.   But when  
11    we let them into evidence, it will just be 1 to whatever  
12    it is.

13                MR. BOOKBINDER:   Your Honor, will you be using  
14    the jurist system so that we'll be submitting them on a  
15    disk as well in advance?

16                THE COURT:   Actually that's a good question  
17    because we just got that capacity.   I've never used it  
18    before.   But yes.   Or we'll make that disk after the  
19    exhibits are entered.

20                MR. BOOKBINDER:   But what we were instructed  
21    by the Clerk is that we would only actually be  
22    submitting them at a pretrial conference or at some  
23    point in advance with the understanding that they could  
24    be supplemented, but --

25                THE COURT:   I know, but they may not all go

1 into evidence.

2 MR. BOOKBINDER: Right. And my understanding  
3 is, and certainly Mr. Hohler can tell me if I'm wrong,  
4 but what we submit on disk isn't necessarily what the  
5 jury will get.

6 THE COURT: Right. No, that's fine. That's  
7 fine.

8 All right. So the 20th. I gave you 20th and the  
9 27th and I want to know by then, say, February 2nd, you  
10 know, let me know which exhibits are objected to, and  
11 you can say just "hearsay" or this or whatever it is,  
12 that it's not co-conspirator -- it's not a  
13 co-conspirator statement, and let me know of any  
14 stipulations.

15 And then I will plan to see you to begin working  
16 on all of this on February 7th at 10:00 and I won't be  
17 available that afternoon.

18 (Pause.)

19 THE COURT: Give me the 7th and the 8th, the  
20 morning of the 7th and all day the 8th. And then I'm  
21 going to be away for a couple of days, but I may want to  
22 see you that following week, one or two mornings, to  
23 polish this up. All right?

24 And is the defendant agreeable to excluding the  
25 time until these voluminous filings are made for Speedy



1 Trial Act purposes?

2 MR. MCGINTY: We are, your Honor.

3 THE COURT: Okay. All right. You have a very  
4 interesting and challenging case. You're doing a very  
5 good job so far. So keep it up.

6 MR. BOOKBINDER: Your Honor, you had asked  
7 earlier about the guidelines. If you want to give me 30  
8 seconds, I've refreshed myself.

9 THE COURT: All right.

10 MR. BOOKBINDER: It is correct that the end  
11 guideline range is 57 to 71 months and the calculation  
12 comes from a base offense level of 7, under 2(b)(1.1), a  
13 14-level enhancement or gain between \$400,000 and a  
14 million dollars, two levels for --

15 THE COURT: I don't need to know the  
16 particulars, I just want to get the range. But actually  
17 that reminds me. It's my standard -- you want to listen  
18 to this.

19 MR. BOOKBINDER: I apologize, your Honor.

20 THE COURT: It's entirely up to -- I'm not  
21 trying to prompt a plea or a dismissal, um, but you've  
22 got a lot to discuss in this case. You'll think about  
23 this further. And there's a tremendous amount of work  
24 that needs to be done and we're all carving out a big  
25 block of time to try the case.

1           So I'm going to order that you confer and let me  
2 know, by January 10, whether you've reached some  
3 agreement to resolve the case. Mr. McGinty says it  
4 shouldn't be a criminal case --

5           MR. MCGINTY: And they may agree.

6           THE COURT: Not that I noticed. But whatever  
7 it is, you're going to be doing a lot more research.  
8 Conspiracy. Mail fraud. So --

9           MR. BOOKBINDER: Your Honor, Ms. Sedky just  
10 pointed out to me that we may have actually  
11 underestimated the legal organizer enhancement, that  
12 guideline calculation, so we'll finalize that and let  
13 Mr. McGinty know where we stand on that.

14           THE COURT: Well, if you're going to have  
15 these discussions, you should know what your respective  
16 positions are, (A), but (B), I mainly just wanted to  
17 know for myself. I mean, you've got many state-of-the-  
18 art legal issues and I'm just curious about what the  
19 potential consequences are.

20           All right? Anything further for today?

21           MR. MCGINTY: No, your Honor. Thank you.

22           MR. BOOKBINDER: No, your Honor.

23           THE COURT: Okay. The Court is in recess.

24           (Ends, 3:25 p.m.)  
25

## C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, of the aforementioned Motion to Dismiss hearing, before Chief Judge Mark L. Wolf, on Tuesday, December 13, 2011, to the best of my skill and ability.

/s/ Richard H. Romanow 12-22-11

\_\_\_\_\_  
RICHARD H. ROMANOW Date